

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Christopher J. Rooney and Debra G. Polak,

Complainants,

vs.

Pacific Bell,

Defendant.

Case 01-07-022
(Filed July 20, 2001)**O P I N I O N****1. Summary**

Complainants allege that Pacific Bell (Pacific) violated Pub. Util. Code § 851 by selling a vacant strip of land in Calpella, California, without the approval of the Commission. On the unique facts of this case, we conclude that the strip of land was not necessary and useful for the provision of telecommunications service and, therefore, prior Commission approval of the sale was not required. The Commission lacks jurisdiction to deal with the complaint's allegations of conflicts of title to the property, that being a matter for the civil courts. The complaint fails to state a cause of action for which relief can be granted by this Commission. The complaint is dismissed.

2. Background

Pacific owns property located at 6140 N. State in Calpella. The property includes a large yard fenced on four sides, containing a small central office, a

trailer used as an office, a shed used for storage, a structure housing a generator, and a structure used to store a “Snow Kat” vehicle.

Outside the fenced yard and adjacent to the rear of the property is a strip of land, approximately 40x140 feet, located within an area of an abandoned public road formerly known as Third Street in Calpella. It is this strip of land that is in dispute.

According to the complaint and Pacific’s answer, the strip of land has been used as a driveway for at least a decade by Alan G. and Joyce R. Ruelle, who own adjoining property. In August 2000, the Ruelles brought suit against Pacific to quiet title against adverse claims to what they alleged were their prescriptive easement rights over the strip of land. Thereafter, Pacific entered into a settlement agreement by which, among other things, Pacific agreed to sell the property and convey it by quitclaim deed to the Ruelles.

Complainants allege that the Ruelles have a history of misuse of the strip of land. Complainants state that they also want to purchase the property. They urge this Commission to prohibit the proposed sale by Pacific and to conduct hearings on the proper disposition of the property.

3. Declaration by Pacific

By ruling dated September 10, 2001, Pacific was directed to file a declaration, under oath, of a knowledgeable employee in support of Pacific’s assertion that the property in question has never been used or necessary in utility operation. Pacific also was directed to brief its assertion that Commission approval was not required for sale of the property. Complainants were invited to respond to Pacific’s filing.

On October 1, 2001, Pacific filed the declaration of Curtis L. Cavin, manager-property management for SBC Communications, Inc., an affiliate of

Pacific that provides real estate support service to the utility. Cavin declared that the 40x140-foot strip of land has not been used by Pacific since its acquisition in 1965 and that there are no plans to use the land in utility operations in the future. Pacific states that even the potential for use of the property is restricted because it is located within an abandoned public road, and abutting landowners have rights to continue use of the strip to get to and from their properties to the next public street.

4. Discussion

Section 851 of the Public Utilities Code specifies that Commission approval is necessary before a utility may dispose of or encumber property necessary or useful in the performance of its duties to the public. At the same time, Section 851 expressly excludes this requirement for the sale of property that is not necessary or useful. In pertinent part, Section 851 states:

“No public utility...shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public...without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void....

“Nothing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value....” (Emphasis added.)

Complainants argue that because the strip of land was included in ratebase while the sale was being negotiated, the land was “necessary or useful” in the performance of Pacific’s duties to the public.

On the contrary, the Commission has held that ratebase treatment is not solely determinative of whether property is necessary or useful within the meaning of Section 851. Instead, the determination is fact-driven, and is to be made on a case-by-case basis, considering the record as a whole. (*See, Citizens Utilities Company of California* (1988) 28 CPUC2d 108, holding that certain timber harvest rights on watershed, included in ratebase, were neither useful nor necessary in the provision of water service; *see also, Re Pacific Gas and Electric Company* (1982) 10 CPUC2d 647, holding similarly as to the sale of certain coal mining property never used by the utility.)

The undisputed facts here are that the 40x140-foot strip of land is outside the rear fenced portion of used and useful property. The strip of land is not used by Pacific for any purpose and has not been used since the time it was acquired as part of the larger parcel in 1965. Moreover, any contemplated use is thwarted by the rights that abutting landowners have to use the strip of land to get to and from their properties to the next public street. (*See, Beals v. City of Los Angeles* (1943) 23 Cal.2d 381.)

Under the unique facts and circumstances presented here, we find that Pacific has met its burden of showing that the strip of land in question is not necessary or useful within the meaning of Section 851.¹ It follows, therefore, that

¹ Of course, the time and effort spent by the Commission and by the parties in performing this analysis could have been avoided had Pacific simply applied in

Footnote continued on next page

the sale falls within that provision of Section 851 in which its disposition “shall be conclusively presumed to be of property which is not useful or necessary...as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value....”

Disposing of the Section 851 issues does not, however, end the matter. We must also determine whether there was proper accounting for a transaction in which property that at one time was in ratebase was transferred from Pacific. In response to questions from our Telecommunications Division, Pacific on December 11, 2001, provided additional information regarding the accounting and ratemaking treatment given to the parcel of land.

According to Pacific, the entire parcel, including the 40x140-foot strip, was included in ratebase, booked to Operating Account 2001, Telephone Plant in Service. On July 11, 2001, internal instructions were issued to remove the 40x140-foot strip from ratebase. On August 13, 2001, an accounting journal entry was made to remove the strip of land from above-the-line ratebase and to place it in below-the-line Non-Operating Account 2006. The quitclaim deed transferring ownership of the strip of land was executed on August 31, 2001, and recorded with the Mendocino County Clerk-Recorder on October 2, 2001.

Pacific states that any gain resulting from the transfer of ownership of the 40-x140-foot strip of land will benefit ratepayers and will be treated in accordance with Commission directions on gain on sale of land as set forth in Decision (D.) 94-06-011, 55 CPUC2d 1, 61 at Ordering Paragraph 7, and 65. Staff

advance for Section 851 approval of the sale, thus removing all doubt as to the validity of the transaction.

confirms that this accounting treatment conforms to Commission rules and practices.

Finally, we note that the gravamen of this complaint is not really the ratemaking treatment of the sale. What complainants seek is a determination that the sale damages their property rights, since they use the land for access to their home, and since they earlier asserted certain equitable and prescriptive rights to the property. These are matters outside of the Commission's jurisdiction. The tasks of determining complainants' interest in or title to the property are questions for the civil courts, and not for this Commission. (*See, Camp Meeker Water System, Inc. v. Public Utilities Commission* (1990) 51 Cal.3d 845, 850, 861.)

The scope of this proceeding is set forth in the complaint and answer. We confirm Administrative Law judge (ALJ) Walker as the presiding officer, and we find that no hearing is necessary.

5. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Complainants in their comments assert that it is not clear that the Commission considered their declarations and brief filed on October 23, 2001. In fact, the brief was reviewed carefully and was in part responsible for the further inquiries conducted by staff into Pacific's accounting treatment for the sale.

Complainants contend that their brief establishes that Section 851 requires that Pacific must keep the disputed property in its possession. As the draft decision explains, this is not the case. Section 851 requires Commission approval for the sale of property that is necessary or useful in the performance of a utility's

duties to the public, but Section 851 excludes this requirement for the sale of property that is not necessary or useful. The draft decision notes that the strip of land at issue was not used by Pacific at any time since it was acquired by the utility, that Pacific has no plans to use it in the future, and that it was in a non-operating account at the time it was transferred. Thus, the draft decision correctly concludes that under Section 851, approval by the Commission of the sale of the property is not required.

Finally, complainants argue that the sale damages their property rights, since they use the land for access to their home. The Commission's jurisdiction, however, does not extend to determining complainants' interest in or title to property, those being questions for the civil courts.

Findings of Fact

1. Pacific owns property in Calpella that includes a 40x140-foot strip of land.
2. Homeowners whose property adjoins the strip of land brought suit to quiet title and to affirm their prescriptive easement over the property.
3. Pacific entered into a settlement agreement by which Pacific agreed to sell and convey the property to the homeowners who had brought suit.
4. This complaint was filed by other adjoining owners who allege that Pacific failed to seek Commission approval of the sale under Pub. Util. Code § 851.
5. On December 11, 2001, Pacific provided the Telecommunications Division with additional information regarding the accounting and ratemaking treatment associated with the property in question.
6. The additional information shows that that the property located at 6140 N. State Street in Calpella, including the 40x140-foot strip of land, was booked to an above-the-line ratebase account.

7. On August 13, 2001, Pacific removed the 40-x140-foot strip of land from an above-the-line ratebase account and moved it to a below-the-line non-operating account.

8. Pacific states that it will treat any gain from the sale of land in accordance with the Commission's directive on sale of land set forth in D.94-06-011.

9. Section 851 excludes from its requirements a utility sale of property that is not necessary or useful in the performance of the utility's duties to the public.

10. Pacific has not used, does not now use, and has no plans to use the strip of land in the performance of its duties to the public.

11. Approval by the Commission of the sale of the property by Pacific is not required.

12. Further inquiry into the propriety of the sale of the property is a matter for the courts and not for this Commission.

Conclusion of Law

The complaint should be dismissed for failure to state a cause of action for which relief can be granted by the Commission.

O R D E R

IT IS ORDERED that:

1. The complaint of Christopher J. Rooney and Debra G. Polak against Pacific Bell is dismissed.

2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.